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IN THE

Supreme Court of the United States

October Term, 1952

No. 279

WILLIAM H. WATTENMAKER and NORMA L. MOORE, Executors, Estate of JOHN H. EDWARDS, Deceased, *Petitioners*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

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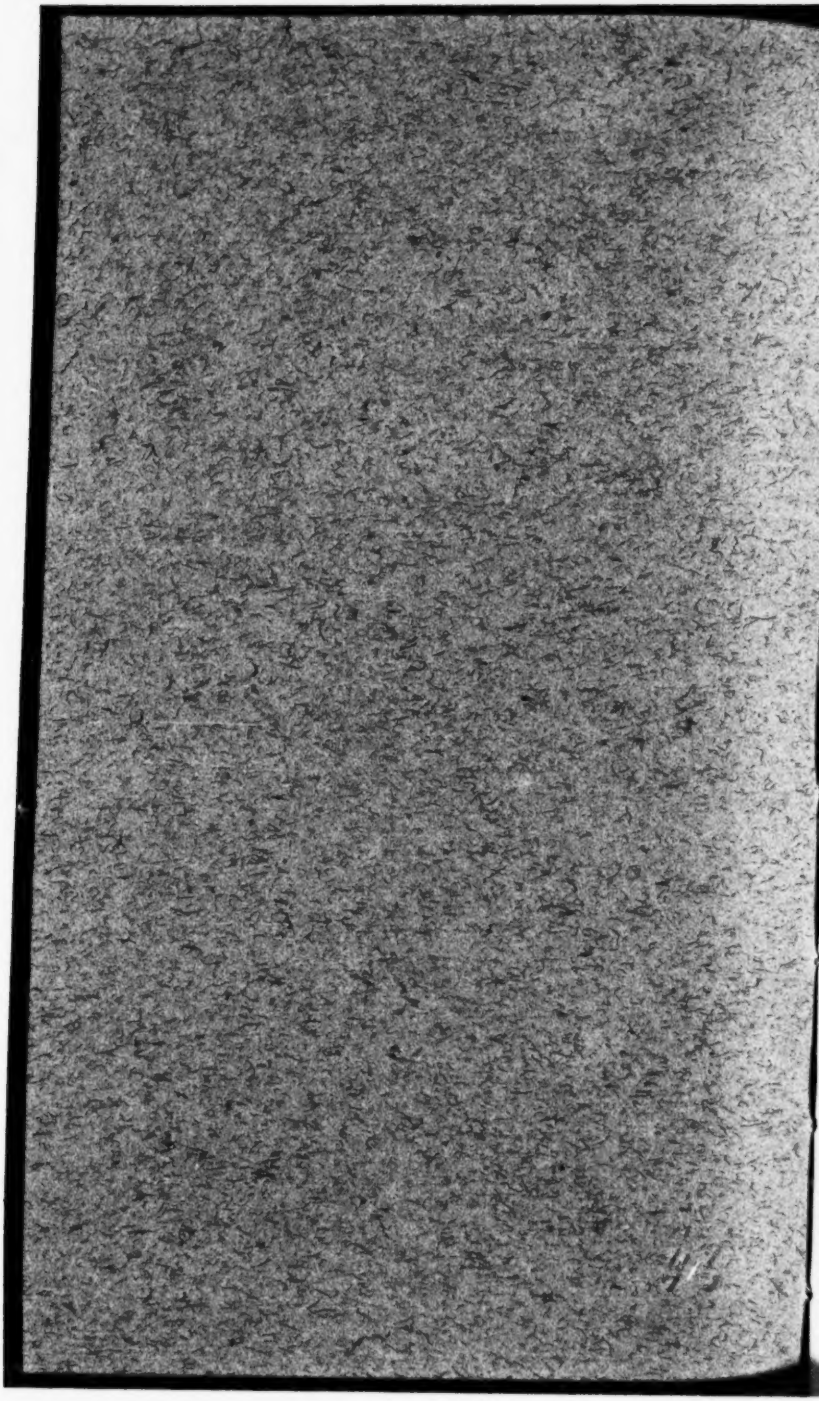

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The petitioners, and the petitioners below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on March 20, 1952 (R. 120).

OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 14, et seq.) is unreported and the opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 113-119) is reported in 195 F. 2d 570.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 20, 1952 (R. 120). By order dated the 10th day of June, 1952, this Honorable Court, by a Justice thereof, extended the time within which petitioners might file a petition for writ of certiorari in the above cause to and including August 16, 1952 (R. 122). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938, c. 229; U. S. Code (1940 ed.), Title 28, Sec. 347(a).

QUESTIONS PRESENTED

1. Whether persons who come to the District of Columbia to enter Federal employment and who remain in the District of Columbia after termination of such employment are, as a matter of law, domiciled in the District of Columbia.

2. Whether, as a matter of law, a person loses his domicile of origin while sojourning in the District of Columbia for an indefinite period, where there is no evidence of any economic or other compulsion or reason for such stay, but where during such stay he consistently and continuously expresses, orally and in writing, his intention to return to his domicile of origin.

3. Does the case of *District of Columbia* v. *Murphy*, 314 U. S. 441, 86 L. Ed. 329 (1941), hold, as a matter of law, that there is a presumption of domicile at the place where a man lives, which presumption places the absolute burden

of proving domicile elsewhere upon a person claiming retention of his domicile of origin, or merely the burden of going forward with countervailing evidence.

4. Whether, under the *Murphy* case, supra, the burden placed upon the taxpayer requiring him to establish domicile elsewhere if he is not to be liable for a tax of the District of Columbia, predicated upon domicile, is satisfied and discharged when the evidence adduced is sufficient to create, prima facie, a doubt or ambiguity.

5. Whether, as a matter of law, the presumption that a domicile, once acquired, continues until it is shown to have been changed, as determined in *Mitchell* v. *United States*, 21 Wall. (U. S.) 350, 22 L. Ed. 584, (1874), is revived and is the prevailing presumption where the presumption of domicile at the place of physical abode, enunciated in the same case and in the *Murphy* case, supra, has been met with a prima facie showing of contrary intent.

6. Whether, as a matter of law, a court can find that a fact does or does not exist in the absence of evidence relating thereto, except in case of those facts of which courts take judicial notice.

STATUTES INVOLVED

The material provisions of the statute involved are contained in Title V, Sec. 1, of the District of Columbia Revenue Act of 1937, 50 Stat. 673, 683, ch. 690, as amended (Sec. 47-1601, D. C. Code, 1940), and are as follows:

> "Taxes shall be imposed in relation to estates of decedents, the shares of beneficiaries of such estates, and gifts as hereinafter provided:
>
> "(a) All real property and tangible and intangible personal property, or any interest therein, having its taxable situs in the District of Columbia, transferred from any person who may die seized or possessed thereof, either by will or by law, or by right of survivorship, * * * shall be subject to a tax as follows: * * *" (Then follow the tax rates.)

STATEMENT OF THE FACTS

Under the statute involved, and applicable decisions,[1] unless decedent were domiciled in the District of Columbia at the time of his death, his tangible and intangible personal property did not have a taxable situs in the District, and the transfer thereof was not subject to inheritance tax.

On July 9, 1948, petitioners paid, under protest, inheritance taxes and interest totalling $22,151.02 to the District of Columbia on the shares of certain beneficiaries of the estate of John H. Edwards, deceased, and, on September 9, 1948, filed a petition for a cancellation of the assessment of such taxes and refund thereof with the Board of Tax Appeals for the District of Columbia, and on May 9, 1949, filed an amended petition upon the ground, among others, that decedent was, at the date of his death, a legal resident domiciled in the City of Mitchell, Indiana and only temporarily residing in the District of Columbia (R. 21).

Decedent was born in Mitchell, Indiana, in 1869. He grew up and attended school in Indiana, entered the practice of law in Mitchell with his father, and between 1902 and 1920 held public office in his home state. In 1921, he was appointed Solicitor of the Post Office Department, and, on May 30 of that year, came to Washington, D. C., to enter upon his duties as such. In 1923, he moved to the Department of the Interior, where he held successively the positions of Solicitor and Assistant Secretary, by presidential appointment. His public service terminated on May 1, 1933, shortly after the change in administration. From his arrival here until 1930 he lived in a hotel. From 1930 until his death on August 20, 1945, Mr. Edwards continued to live in Washington, occupying a three-room rented apartment (R. 15).

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[1] See *Pace* v. *District of Columbia*, 73 Wash. Law Rep. 537 (May 25, 1945); *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406 (1944).

Decedent had a law office located over the Bank of Mitchell, Mitchell, Indiana, the doors and windows of which continued to bear his name and which contained his law library throughout the period from 1921 until his death. (R. 81). The law library consisted of 200 or more volumes occupying twenty-five or more bookcase sections which occupied over half the office. (R. 35, 56, 81, 82, 101).

During the period of his stay in the District of Columbia decedent always referred to Mitchell as his home, and the District as a place where he was residing temporarily, with a view to returning to Mitchell. (R. 69, 78). From 1921 until his death decedent made annual visits to Mitchell for the purpose of voting, taking care of legal matters of the Lehigh Portland Cement Company there, and visiting with friends and relatives. (R. 15, 37, 38, 39, 43, 44, 46, 65, 77, 100, 101, 102). Such trips lasted about ten days to two weeks, of which about four days were occupied by his law business and the remainder was devoted to visiting friends and relatives, going on trips to nearby points with a friend and visiting friends there, and also visiting Indiana University, his alma mater, at Bloomington, Indiana. (R. 15, 38, 77, 101).

Decedent owned a residence in Mitchell which had been his family residence and which he occupied on his many trips to Mitchell until around 1937, when he caused it to be demolished because it was over fifty years old and was in need of extensive repairs. (R. 77, 104).

On various occasions during his stay in the District and as late as 1945 decedent stated that he intended to return to Mitchell to live. He spoke of building a new home either on the old site or elsewhere in or near the town. (R. 40, 41, 46, 77, 78, 100, 101, 107).

At his death he owned the site of his former house in Mitchell and two cemetery lots in addition to the family burial lot in the Mitchell cemetery in which he was buried. (R. 16, 17, 18, 39, 40). He owned no real estate in the District, but at his death owned in the District household goods

of a value of $265.00, and cash and bonds of a value amounting to slightly more than $100,000. He also owned securities and cash of over $140,000.00 in New York City. (R. 116).

Decedent left a last will and testament dated May 2, 1943, which was executed in and which stated he was of the City of Mitchell, Lawrence County, Indiana, which will was admitted to probate by the Circuit Court of Lawrence County, Indiana. (R. 14).

All of his Federal income tax returns filed annually to the date of his death were filed with the Collector of Internal Revenue in Indianapolis. On all such returns for the year 1930 and subsequent years he gave as his address his Washington apartment and his "permanent address" as Mitchell, Indiana. (R. 70). He filed District of Columbia personal property tax returns for the fiscal years 1938, 1939, 1940, 1943, and 1944. The returns for the years 1938, 1939, and 1940 contained the notation "Permanent address, Mitchell, Indiana". (R. 18). The return for 1944, filed shortly before his death, contained the following statement:

> "I do not regard Washington as my residence and make no attempt to accumulate furnishings here, but pay taxes here as if a resident." (Resp. Exh. T, Orig. R. 289).

In 1941 and 1943 decedent stated in writing that he was a citizen of Mitchell temporarily in the District of Columbia. (R. 19).

Decedent executed wills in 1925, 1934, 1938, 1941, and 1943 in each of which he described himself as "of the City of Mitchell, Lawrence County, of the State of Indiana". The wills made in 1934 and subsequent years contained, among others, a bequest to a church in Mitchell, and bequeathed and devised the residuum of his estate to Indiana University for education purposes. (R. 19).

Decedent paid Indiana intangible taxes for the years 1936, 1937 and 1938. There is no evidence in the record as

to whether he paid such taxes for prior or subsequent years, nor does the record contain any evidence as to whether he did or did not pay Indiana gross income taxes.

The Board of Tax Appeals found as a fact the decedent was domiciled in the District of Columbia at the time of his death and concluded as a matter of law that the property of decedent upon the transfer of which the taxes appealed from were levied, had at the time of decedent's death a taxable situs in the District of Columbia and that such taxes were correctly assessed. (R. 21, 22).

The Court of Appeals affirmed the findings of the Board that after 1933 decedent did not have a fixed and definite intent to return to Indiana and that consequently he died domiciled in the District of Columbia. (R. 119).

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred:

(1) In holding, under the *Murphy* case, supra, that decedent, who died in the District of Columbia, was domiciled in the District of Columbia at the time of his death, because he did not remove his physical abode back to his domicile of origin upon the termination of his Federal employment.

(2) In holding that, because decedent resided in the District of Columbia for twelve years following termination of his Federal employment and no affirmative reason was shown for such stay, he was domiciled in the District of Columbia at his death therein despite his consistent and continuous expressions during such stay of his intention to return to his domicile of origin.

(3) In holding in effect that there was an absolute burden of proof upon petitioners to establish by a preponderance of the evidence that decedent was domiciled in Mitchell, Indiana, and not in the District of Columbia, in

order to overcome or rebut the presumption that a man's domicile is where he physically resides.

(4) In holding in effect that evidence adduced which created, prima facie, a doubt or ambiguity was insufficient to rebut or overcome the presumption that a man's domicile is in the jurisdiction of his physical abode.

(5) In failing to hold that decedent retained his domicile of origin under the rule enunciated in *Mitchell* v. *United States*, 21 Wall. 350, 22 L. Ed. 584, that a domicile, once acquired, continues until it is shown to have been changed, such presumption being revived as the prevailing presumption, when the presumption of domicile at the place of physical abode has been met by countervailing evidence of the decedent's intent to retain his domicile of origin.

(6) In holding that decedent never paid Indiana gross income taxes and in failing to reverse the finding of the Board of Tax Appeals for the District of Columbia that decedent did not pay the Indiana intangibles tax after the year 1938, when there was no evidence as to whether decedent did or did not pay such taxes.

(7) In not reversing the decision of the Board of Tax Appeals holding that decedent was domiciled in the District of Columbia at the time of his death and that the property of decedent upon the transfer of which the taxes appealed from were levied, had a taxable situs in the District of Columbia.

REASONS FOR GRANTING THE WRIT

(1) Clearly, the questions presented by this petition are of importance in the administration of the Income, Inheritance and Estate Tax laws of the District of Columbia as the same are to be applied to all Federal employees coming to the District to work who remain in the District following termination of Federal employment, and to those persons who may die during an indefinite sojourn in the

District of Columbia. The resolution of these questions will determine the plans and actions of a great many people physically residing in the District of Columbia who cannot, under the present status of the law, intelligently decide upon a course of action with regard to their tax problems with any degree of certainty.

(2) In addition, the resolution of the questions presented by this petition will clarify, once and for all, the conflict which exists between the applicable decisions of this Court and the United States Court of Appeals for the District of Columbia Circuit with regard to the true character, nature and relative effect of the legal presumptions involved in the determination of domicile and the manner and extent to which they must be rebutted, and also will settle, once and for all, the eternal conflict between "physical abode" of a litigant, on the one hand, and his "animus manendi" or intent, on the other, in establishing domicile.

(3) This Court is also called upon by this petition to locate definitely in "domicile cases" the party upon whom rests the burden of proof, i.e., whether upon the taxing authority or upon the taxpayer or his legal representatives, as distinguished from the burden of going forward with countervailing evidence in the face of the presumption flowing from physical abode. In this connection, if the writ prayed for is granted, this Court will also decide whether the basic chronological presumption that a man retains his domicile of origin or former domicile becomes the controlling presumption in those cases where the countervailing evidence tends to rebut or create an ambiguity as to the correctness of the presumption flowing from physical abode.

ARGUMENT

I. The Court of Appeals has misconstrued and has not given proper effect to the case of *District of Columbia* v. *Murphy*, 314 U. S. 441, 86 L. Ed. 329, (1949), and in so doing has overlooked the intent and effect of the case of *Mitchell* v. *United States*, 21 Wall. (U. S.) 350, 22 L. Ed. 584, (1874). This Court, in its opinion in the *Mitchell* case, supra, at pages 352 and 353 stated in pertinent part as follows:

> "A domicil once acquired is presumed to continue until it is shown to have been changed. * * * Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. *** To constitute the new domicil two things are indispensable: First, residence in the new locality; second, the intention to remain there. Change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicil for another. Until the new one is acquired, the old one remains. * * * these principles are axiomatic in the law upon the subject."

The Court of Appeals, in applying the *Murphy* case, supra, to the instant case has given so much weight to the presumption of domicile at the place of physical abode that the meaning and legal purport of "animus manendi" has almost been completely vitiated. In other words, the Court of Appeals has in effect held that physical abode and physical abode alone is the only true and reliable evidence of a man's intent with regard to domicile.

The effect of the decision in the instant case is to shift the burden of proof from the party asserting a change in domicile, in this case the taxing authority of the District of Columbia, to the litigants who maintain that there has been no change in domicile. This result is contrary to law. *Mitchell* v. *United States*, supra; *Texas* v. *Florida*, 306 U. S. 398, 59 S. Ct. 563, 83 L. Ed. 817; *Ennis* v. *Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472.

The burden of proof in a case in litigation does not shift with the evidence. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U. S. 104, 86 L. Ed. 89, 96, 62 S. Ct. 156, 161; 9 Wigmore on Evidence, Section 2489 (3rd Edition, 1940) and cases cited therein.

The normal function of a presumption is to assist the party having the burden of proof, but the presumption does not cause the burden of proof to shift, the presumption merely serving to shift the burden of going forward with evidence. It is the general rule that a presumption vanishes when evidence of the fact in issue appears. A presumption is rebutted when a contrary fact appears. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, supra, *New York Life Ins. Co.* v. *Ross*, 30 F 2d 80; 20 Am. Jur., Evidence, Sec. 160. It is petitioners' position that the evidence in the record of the intention of the decedent to return to Indiana met the presumption raised by his physical abode in the District of Columbia, as a matter of law. Such evidence raised an ambiguity or a doubt which should cause the presumption of domicile flowing from physical abode to vanish and revive the taxing authority's absolute burden of proof to establish the District of Columbia as the domicile of the decedent by affirmative evidence.

In the case of *Mitchell* v. *United States*, 21 Wall. (U. S.) 350, 22 L. Ed. 584, (1874), this court stated two presumptions: first, that "the place where a person lives is taken to be his domicile until facts adduced establish the contrary". Second, "A domicile once acquired is presumed to continue until it is shown to have been changed". Mr. Edwards' domicile of origin in Indiana was *unquestioned*. In accordance with the presumption that a domicile once acquired is presumed to continue until it is shown to have been changed, his domicile of origin in Indiana continued throughout his stay in the District of Columbia unless the presumption that the place where a person lives is taken to be his domicile until facts adduced establish it to the contrary, overcomes the presumption of continuance of domi-

cile or origin. In the *Murphy* case, supra, this Court said "that it is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax". Thus. we have the situation where the taxing authority is given the benefit of a presumption which, however, is only a prima facie presumption that a person residing in the District is domiciled in the District. This Court has recognized that such presumption is rebuttable, which raises the question whether, in order to rebut or overcome such presumption, it is necessary to do so by a preponderance of the evidence sufficient to establish the fact of domicile elsewhere or merely by sufficient evidence to create doubt or ambiguity as to the intent of the individual. The Court of Appeals in its opinion (R. 117) said regarding Mr. Edwards' conduct:

> "On these and other points, Edwards' conduct was ambiguous at best."

This admission of the Court of Appeals of ambiguity or doubt is sufficient, in the opinion of petitioners, to meet the prima facie presumption flowing from physical abode in the District. The quoted statement of the Court of Appeals clearly indicates that it was seeking proof by a preponderance of the evidence on behalf of the decedent, rather than giving the correct effect to a basic principle of evidence involved in the ancient concepts of domicile. If the petitioners' position is tenable, then the original presumption of continuation of domicile of origin must be revived upon creation of the ambiguity and must control the determination of the question of domicile.

The correct interpretation of the *Murphy* case, supra, is that a showing of countervailing evidence by a taxpayer, or in the instant case a taxpayer's legal representatives, which raises a doubt or ambiguity in the mind of the trier of fact, overcomes and wipes out the presumption favoring the taxing authority raised by the unexplained stay of the

taxpayer in the District of Columbia and requires a finding for the taxpayer or his legal representatives who assert retention of the taxpayer's domicile of origin or formerly acquired domicile. Only by this interpretation of the *Murphy* case, supra, can the classical common law rule that he who asserts a change in domicile bears the burden of proof be retained, and at the same time give effect to the basic principle of the law of evidence that a presumption, based upon inherent probability, is overcome by a showing of countervailing evidence sufficient to make the evidence of the inferred fact as improbable as it is probable.

The petitioners submit that the Court of Appeals in the instant case has redefined the law of domicile and the basic principles of evidence enunciated by this Court in the *Murphy* case. For the Court of Appeals to redefine a legal concept by inference or innuendo is clearly giving an improper effect to a decision of this Court. The Supreme Court of the United States does not redefine basic concepts and principles of law by inference and innuendo. When this Court undertakes to change, modify or redefine basic concepts and principles of law it does so expressly.

Therefore, this Court should take this case on certiorari in order to correct a misapplication and misinterpretation of three of its decisions by the Court of Appeals; namely, the *Murphy* and *Mitchell* cases, supra, as they relate to the law of domicile and the *Commercial Molasses* case, supra, as it relates to the law of evidence.

II. The Court of Appeals held that, since Mr. Edwards remained in the District of Columbia after termination of his Federal employment, such circumstance was inconsistent with a "fixed and definite" intent to return to Indiana upon his separation from the government. The following is quoted from that Court's opinion:

> "* * * As the Board of Tax Appeals said, 'his situation was such that he could live wherever he chose.' Certainly his remaining under these circumstances was quite inconsistent with a 'fixed and definite' intent to

return to Indiana *upon his separation from the government.* * * * " (Italics supplied).

The *Murphy* case was an income tax case and dealt with a living person who was at the time employed by the government. This Court said in the *Murphy* case, supra, "in order to retain his former domicile, one who comes to the District to enter government service must always have a fixed and definite intent to return and take up his home there *when separated from the service,* * * *" The Court of Appeals has construed the above-quoted language to mean that, because decedent came to the District of Columbia to enter government service, and failed to return and take up his home at his former place of abode when separated from the service, he was domiciled in the District of Columbia.

In the instant case, decedent resided in the District of Columbia some twelve years subsequent to the cessation of his government service. Assuming, for the purpose of argument, that during the entire twelve years decedent had a fixed and definite intent to return to Mitchell, Indiana, his former home, does the principle of the *Murphy* case nevertheless require the finding that, merely because he did not return upon termination of his government service, he could not have had a fixed and definite intention during such twelve years to return to his former home? Irrespective of whether decedent came to the District of Columbia to enter government service, the law has recognized many legitimate reasons for residing in a given jurisdiction short of an intention to establish domicile there and has preserved the domicile of origin in such cases provided that during such residence the persons involved maintained a fixed and definite intention to return to their former abode. *Mitchell* v. *United States, supra.*

Petitioners submit that Mr. Edwards' stay in Washington for twelve years after he ceased his Federal employ-

ment is not inconsistent with a fixed and definite intent to return to Indiana within the meaning of the *Murphy* case. While no affirmative reason explaining Mr. Edwards' prolonged stay in the District appears in the record, he and he alone knew best "whence he came, what he left behind, and his own attitudes * * *", but he could not be in Court to defend himself or his estate. Petitioners contend that the absence of a positive reason for staying in the District under such circumstances does not justify the judicial conclusion that he had no fixed and definite intent to return to his domicile of origin.

A number of reasons can be implied from the evidence which, taken together, explained why Mr. Edwards remained in the District. First, he had occupied a high and responsible position in the government. He had numerous contacts, both inside and outside the government, which he desired to keep alive for potential business purposes. It also must be remembered that Mr. Edwards was a staunch and active Republican, and he may have thought that there would be a return of a Republican administration, in which event, he could again assume a position of a responsible government servant. Secondly, he had been forced to demolish his old home and residence in Mitchell, Indiana, because it was in a state of bad repair. It was over fifty years of age. His plan, as shown by the record, was to return to Mitchell, Indiana, and build himself a new home, either on the site of the old home or on the edge of town. During the war years there were Federal restrictions on the use of building materials for construction of residential property. Such restrictions could well have prevented the carrying out of the plans voiced by Mr. Edwards to build a new home. This fact alone could have been the cause of the delay of the return of Mr. Edwards to Indiana. The record shows that it was first noticed in the year 1944 that Mr. Edwards' health began to fail. In the spring of

1944, he visited a newly constructed hospital in Mitchell, Indiana, and at that time stated that he was pleased that such facilities were at last available to Mitchell, Indiana, and that they constituted an additional inducement for his return. Could it not be argued that Mr. Edwards, knowing his own physical condition, had not returned because of the inadequate medical and hospital facilities available in Mitchell, Indiana, prior to the construction of the hospital in 1944, and that he remained in the District because it afforded ample facilities of that nature?

Therefore, it is submitted that, it is an incorrect application of the *Murphy* case to hold that because Mr. Edwards did not return to Mitchell upon the termination of his government service, he did not have a fixed and definite intention to return there.

III. In the instant case evidence was introduced proving that decedent paid Indiana intangibles taxes for the years 1936, 1937, and 1938. No other evidence whatsoever was introduced as to whether decedent paid any other Indiana taxes with the exception of real estate taxes, either prior to or subsequent to that period of time. With the record in this state, the Board of Tax Appeals erroneously found as a fact that the decedent did not pay Indiana intangibles taxes after 1938, and that decedent never filed gross income tax returns, nor paid gross income taxes in Indiana. The Court of Appeals erroneously followed the finding of the Board of Tax Appeals as to the payment of Indiana taxes, although there was no evidence in the record as to whether decedent did or did not file such returns or pay such taxes. Petitioners submit that it is axiomatic that affirmative findings of fact must be supported by some evidence, and that affirmative findings of fact predicated upon no evidence are contrary to law.

CONCLUSION

On account of the basic errors on highly important points apparently made by the Court of Appeals as recounted above, and each of them, the decision below should be reviewed, to the end that the law of domicile and the rules of evidence relating thereto, as the same pertains to the large body of citizens, who have physical abode in the District of Columbia but who claim domicile elsewhere, may be finally and correctly settled.

Respectfully submitted,

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CHARLES ELMORE C

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DISTRICT OF COLUMBIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 279

WILLIAM H. WEITKNECHT AND NOBLE L. MOORE, Executors, Estate of John H. Edwards, Deceased, *Petitioners*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The "opinions below" is correctly stated on Page 2 of the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition except that Title 28, United States Code, Section 1254 (62 Stat. 928, c. 646) and Section 47-2404, D. C. Code, 1951 (52 Stat. 371, c. 223), as amended by Section 2(b) of the Act of July 10, 1952, 66 Stat. ..... (Public Law 493, 82d Congress, c. 649, 2d session), are applicable.

STATUTES INVOLVED

The pertinent provisions of the statute involved are set forth in the petition at Page 3.

COUNTER-STATEMENT OF THE CASE

This is a District of Columbia inheritance tax case. The Assessor made assessments against legatees under the decedent's will (R. 20, Finding 22). The decedent's Executors appealed to the Board of Tax Appeals for the District of Columbia from said assessments on several grounds, one of which was that the decedent, at the time of his death, was domiciled in the City of Mitchell, Indiana (R. 21, Finding 23). The respondent moved to dismiss the appeal on the ground that petitioners (the Executors) are not persons aggrieved [1] by the assessments but the motions were overruled (R. 21, Finding 24). After the hearing before the Board the petitioners, in their brief, abandoned all issues except that of domicile (R. 21, Finding 23).

The Board of Tax Appeals made extensive and thorough basic findings of fact on the question of decedent's domicile (R. 14-20), based upon the testimony of several witnesses and documentary evidence, and an ultimate finding of fact (R. 20, Finding 20) based upon such basic findings, to the effect that decedent was a resident of the District of Columbia at the time of his death. The Board concluded as a matter of law that since the decedent was domiciled in the

[1] See *Spriggs* v. *Stone, et al.* 85 U. S. App. D. C. 95, 174 F. (2d) 671.

District at the time of his death the decedent's property here involved had a taxable situs in the District at such time, and that the inheritance taxes involved were correctly assessed and the assessments should be affirmed (R. 21, 22, Conclusions 1, 2). A decision was entered accordingly (R. 26).

The decision of the Board of Tax Appeals (now the District of Columbia Tax Court) [2] was affirmed by the United States Court of Appeals for the District of Columbia Circuit (R. 113-120).

The decedent was a native of Indiana and entered service of the Federal Government in 1921 where he remained until May 1, 1933, when his Federal Government service ended (R. 14, 15).

From the time decedent's Federal Government service ended in 1933 until his death on August 20, 1945, the decedent resided in the District of Columbia (R. 15, Finding 3).

Decedent died in the District of Columbia (R. 14, Finding 1). In a document prepared by him on May 4, 1944, for the assistance of his Executors in the execution of his last will and testament the decedent advised them to continue the rental of his apartment in the District of Columbia until all records were removed and furniture was disposed of. Decedent further suggested that his Executors pay a month's rent in advance (R. 19, Finding 19).

Prior to coming to the District in 1921 decedent had lived in a home in Mitchell, Indiana, which he owned and which was the residence of his father. In the middle 1930's decedent caused this home to be demolished and disposed of his personal property therein. The house was old, in a bad state of repair, and he complained about the taxes levied on it (R. 16, Finding 7; R. 111).

Evidence tending to show that decedent voted in Indiana after he left Federal Government service was not persuasive to the District of Columbia Tax Court (R. 25).

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[2] See Section 5 of the Act of July 10, 1952, *supra*.

The laws of Indiana imposed intangible-property taxes on residents of that State during the period from 1933 to the date of decedent's death. Decedent did not pay such taxes after 1938.[3] (R. 17, Finding 11.)

Also, from 1933 to the date of decedent's death, the laws of Indiana imposed a 1% tax on gross income in excess of $1,000 on residents of that State (R. 17, Finding 11). Decedent's net income for the years 1939 to 1944, inclusive, was $6,816, $6,787, $7,117, $5,269, $4,384 and $4,006, respectively, in addition to income from United States Government bonds of the maturity value of $80,000 to $90,000 (R. 15, Finding 5). It did not appear that decedent ever filed gross-income tax returns or paid gross-income taxes in Indiana (R. 17, Finding 11). On the other hand, beginning with the year 1939 and continuing through the year 1945 (the year of decedent's death) the laws of the District of Columbia imposed income taxes on individuals "domiciled in the District of Columbia" on the last day of the taxable year.[4] Decedent voluntarily filed District of Columbia income tax returns for the years 1939 to 1944, inclusive (R. 18, Finding 12), and paid such taxes which were very much less than Indiana intangible-property taxes would have been (R. 24). The rates of the Indiana gross-income tax and of the District of Columbia net-income tax were substantially the same, and decedent's net income was always within $250 of his gross income (R. 24 and R. 18, Finding 12). Decedent's District of Columbia income-tax returns, filed for the years 1939 to 1944, inclusive, did not contain any notation indicating that he was domiciled in Indiana or elsewhere than in the District of Columbia (R. 18, Finding 12).

As pointed out above, the District of Columbia Tax Court determined that the decedent was domiciled in the District

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[3] Decedent expressed "surprise and disappointment" at the amount of intangible-property taxes he had to pay to Indiana (R. 43). This happened about the middle or latter part of the 1930's (R. 66, 67), about the time decedent demolished his home in Indiana (R. 16, Finding 7).

[4] Secs. 47-1501, 47-1502 and 47-1551, D. C. Code, 1940, and Supp.

of Columbia at the time of his death. The sole question before the United States Court of Appeals for the District of Columbia Circuit was whether the decedent was domiciled in the District of Columbia at the time of his death (R. 113, 114). In affirming the decision of the Board of Tax Appeals for the District of Columbia (now the Tax Court) the Court of Appeals for the District of Columbia Circuit stated (R. 118):

> "Petitioners have attacked the findings of fact of the Board of Tax Appeals. In a proceeding such as the present we must accept the Board's findings unless they are clearly wrong. *District of Columbia* v. *Pace*, 320 U. S. 698, 701-03. While we believe that the Board's findings in this case were substantially correct, where there seemed room for dispute we have taken a view more favorable to petitioners. Even so, the Board's [Tax Court's] conclusion must stand that after 1933 Edwards [the decedent] did not have a fixed and definite intent to return to Indiana, and that consequently he died domiciled in the District of Columbia."

ARGUMENT

The petition should be denied.

This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702. The statute involved in the case at bar is the same one which was involved in the *Pace* case, and in that case this Court said that it did not take the case "to determine where Mr. Pace was domiciled" (320 U. S. 700). This Court took the case to determine the scope of review of the decisions of the Board of Tax Appeals (now the District of Columbia Tax Court).

This Court said that the United States Court of Appeals for the District of Columbia Circuit had power to set aside the determination of the then Board of Tax Appeals if convinced, as it was, that the Board was clearly wrong and that it is not called upon to separate factual from legal grounds of decision and to determine if reversal of the Board of Tax Appeals by the Court of Appeals could stand on questions of law alone (320 U. S. 703). Of course, the reason for the statement made by this Court in the *Pace* case, just referred to, was that in *District of Columbia* v. *Murphy*, 314 U. S. 441, this Court had said that "the question of domicile is a difficult one of fact" (314 U. S. 455) and then proceeded to set forth detailed criteria by which it could be determined by lower courts whether persons were or were not domiciled in the District of Columbia.

The Court of Appeals for the District of Columbia Circuit, in affirming the decision of the then Board of Tax Appeals, holding the decedent domiciled in the District of Columbia at the time of his death, wrote a comprehensive and learned opinion with appropriate references to applicable decisions of this Court on the subject. It is plain from that Court's opinion that where there seemed any room for dispute about the facts found by the then Board of Tax Appeals it took "a view more favorable to petitioner" (R. 119), but arrived at the view that the decision of the lower tribunal was correct.

Fundamentally, this domicile case is no different from any other domicile case. Petitions for writs of certiorari in similar domicile cases have been denied by this Court as shown by the citations in the footnotes of the opinion of the Court of Appeals for the District of Columbia Circuit (R. 118.) There is no conflict of decisions of this Court or misinterpretation thereof by the lower Court as petitioners appear to contend in their argument in support of the petition. There is no ambiguity in this Court's pronouncement in the *Murphy* case, *supra*, that (314 U. S.455):

> "• • • The taxing authority is warranted in treating as *prima facie* taxable any person quartered in the District on tax day whose status it deems doubtful. It is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax."

The Court of Appeals in *Beedy* v. *District of Columbia*, 75 App. D. C. 289, 126 F. 2d 647 (cited in footnote 8 of its opinion in the case at bar (R. 117) stated:

> "• • • In the Murphy case the Supreme Court placed the burden upon the individual quartered in the District to establish domicile elsewhere to escape the tax."

and, of course, it needs no citation of authority for the well-established rule that an assessment of tax is presumptively correct and the burden of proving otherwise rests upon the person attacking it. In this connection it is pertinent to note that the decedent in the present case voluntarily paid District of Columbia income taxes from the time the statute was in force in 1939 until his death. The liability for such taxes was based upon domicile in the District of Columbia. At about the time decedent started paying District of Columbia income taxes he ceased paying Indiana intangible taxes. Furthermore, decedent issued instructions to his Executors to retain his District of Columbia apartment after his death. Clearly, at the time of issuance of those instructions (May 4, 1944) decedent intended to remain in the District for the balance of his life. Obviously, he never changed that intent. His instructions were in force at the time of his death.

Rule 38, par. (c), of the Revised Rules of this Court indicates the nature of the reasons for which a writ of certiorari will be granted. Applying those reasons to the instant case it seems clear that a writ should not issue in this case.